the application of a *cy-pres* scheme because such a scheme is only granted where there is a general charitable intention disclosed in the instrument. (*Cheang Tew Muew & Ors.* v. *Cheang Cheow Lean Neo & Ors.*[4]).

In the present case it seems to me that the trust is still complete and all that has happened is that there has been the involuntary substitution of a sum of money for some pieces of land.

I have not been referred to any authority in which the facts bear any similarity to the facts of the present case. However, some assistance can, I think, be obtained from cases arising out of war damage legislation in England where sums of money, so to speak, involuntarily took the place of land.

In *In re Scholfield's Will's Trusts, Scholfield* v. *Scholfield & Ors.*[5] certain freehold and leasehold properties had been held by trustees upon the trusts of a will. These properties had suffered war damage and value payments in respect of the damage both to the freeholds and leaseholds were made to the trustees by the war damage commission under the War Damage Act, 1943.

It was conceded by all parties in that case that the value payments which had been received from the war damage commission in respect of the testator's freehold properties should be treated wholly as capital and retained and invested by the trustees accordingly, the freehold properties presumably remaining vested in the trustees.

The result of the war damage to the leasehold properties, however, was that the leaseholds had disappeared, not by expiry but by war damage followed by disclaimer under the War Damage Act, 1943. In their stead, however, were sums of money, the value payments made in respect of the damage. In reaching a decision as to how these sums of money should be treated Romer J. stated the general principle as follows:—

"The fact that money has, through wholly fortuitous circumstances, been substituted for an interest in property affords, in my judgment, no ground for effecting, in addition, a substitution of beneficial interests. Fairness of administration would appear to require that, so far as possible, the rights of the beneficiaries should survive the destruction of the property from which they derived the income which the testator gave them."

In those circumstances his Lordship decided that so far as possible the sums of money should be treated in the same way as the leasehold properties from which they were derived.

That case is not, of course, exactly on all fours with the present case but in the present case money has through wholly fortuitous circumstances been substituted for an interest in property. Applying the principle enunciated in *Scholfield's case* the compulsory acquisition of part of the trust property under the Land Acquisition Act, 1960, would not appear to be any ground for effecting any substitution of the persons entitled to the benefit of that property. In the present case fairness of administration would appear to require that as far as possible the interest of the trustees and therefore the interests of the persons entitled to the benefit of that property should survive the acquisition of that property.

Accordingly I hold that the sum paid into court as compensation for the compulsory acquisition of Lots 139(3), 139(2), 144(1) and 143 does not go to the plaintiff upon a resulting trust.

The plaintiff's claim is therefore dismissed with costs. There will be judgment for the 1st, 2nd and 3rd defendants on their counterclaim in the terms of prayer 1 thereof with costs and no order in respect of prayer 2, 3, 4, 5 and 6 thereof, and there will be judgment for the 4th, 7th and 8th defendants on their counterclaim in the terms of prayer (i) thereof and in respect of prayer (ii) thereof there will be an order for the payment of the sum of $147,349.59 to the 1st, 2nd and 3rd defendants as trustees of the said indenture, with costs.

Claim dismissed.

Solicitors: *Ong Huck Lim & Co.; Lim, Lim & Oon; Lim Cheng Ean & Co.*

CHANAN SINGH v. THIYAGALETCHUMI

[A.C.J. (Ong J.) May 10, 1965]

[K.L. — Civil Appeal No. 15 of 1964]

Landlord and Tenant — Joint ownership of land — One co-owner giving notice to quit to tenant — Validity of notice — Subseguent sub-division of land — Tenant's acceptance of fresh tenancy — Owner of one lot entering into tenancy over portion of land over which he has no disposing power — Whether trespasser of that portion of land — Control of Rent Ordinance, 1956.

The appellant was the occupying tenant since 1951 of a hut built on a portion of land in the town of Kajang. The owner one Ngo Jin hold an undivided half share of the said land to the respondent in 1958. Subsequently Ngo Jin and the respondent agreed to subdivide the land into two lots and two separate titles were issued to them in their respective names. The respondent then filed her action against the appellant in the sessions court claiming repossession of that portion of the respondent's land occupied by the appellant. The difficulty arose because it was found that the boundary line separating the respondents land from Ngo Jin's land ran through the middle of the appellant's hut. The president of the sessions court gave judgment in favour of the respondent. On appeal,

Held: (1) the appellant by agreement with Ngo Jin had accepted the determination by Ngo Jin of his tenancy which was granted by her before 1958 which tenancy was binding on the respondent when she acquired her half-interest in the land;

(2) the appellant accepted in its place a fresh monthly tenancy from Ngo Jin not only of a portion of the land belonging to herself but also over a portion of

the respondent's lot of which Ngo Jin had no disposing power whatsoever;

(3) in so far as the fresh tenancy purported to comprise any area outside Ngo Jin's land it was invalid;

(4) the appellant was and has been a trespasser on the respondent's land after July 1959 to whom no notice is required to be given;

(5) as the relationship of landlord and tenant does not exist between the respondent and the appellant the Control of Rent Ordinance has no application.

Cases referred to:—

(1) *In re Bobington's Tenancy* [1921] 1 Ch. 559.

(2) *Doe* v. *Archer*, 14 East 245, 248.

CIVIL APPEAL.

Tara Singh for the appellant.

Athi Nahappan for the respondent.

Ong J.: This appeal raises questions of unusual difficulty. The appellant has, since 1951, been the occupying tenant of a ramshackle hut standing on a portion of what was formerly Lot No. 10 in the town of Kajang, held under Certificate of Title No. 1592. Ownership of the land during this period passed through several hands until 1958 when the last registered proprietor, Ngo Jin, sold an undivided half-interest therein to the respondent, Thiyagaletchumi. This Tamil lady and Ngo Jin then entered into a written agreement on October 22, 1958 for subdividing the land into two equal portions. In the result, two separate titles were issued to them in January 1962, and the respondent is now registered as sole proprietor of the portion known as Lot No. 16, held under Certificate of Title No. 21378. The adjoining Lot No. 15 continues under ownership of Ngo Jin.

Shortly after the respondent purchased her share of the land in 1958 friction arose by reason of the appellant's hut standing so close to the respondent's house that the parties and their children got into each other's way.

On December 5, 1960, the respondent commenced an action in the Kajang magistrate's court against the appellant for trespass and on May 20, 1961 she succeeded in obtaining an order against him that he "do vacate and render vacant possession of the portion of the plaintiff's land held under Title No. 1592, Lot No. 10, within 30 days." Against such order an appeal was subsequently allowed on September 18, 1961, on the following grounds:

"The plaintiff on November 3, 1958 purchased an undivided half-interest in the land in question. The defendant occupies a house built upon this land. Its precise situation on the land is unknown and is not stated in the evidence. The land has not been subdivided. There appears to have been some understanding or agreement between the co-owners that each should have for him or herself a one-half portion exclusively; but in the absence of any survey or sub-division the plaintiff came before the magistrate's court without being able to state where or in what manner or direction the dividing line should be drawn. Such being the state of affairs, even if there was some encroachment on the plaintiff's land by some portion of the defendant's house, such encroachment is incapable of being fixed at all, much less fixed with precision. No order should ever have been made which is incapable of being enforced. This ground alone suffices for the appeal to be allowed and the order of the magistrate set aside."

That action of course failed because the respondent, as plaintiff, had only a half-interest, undivided at that, in Lot No. 10 and Ngo Jin had not been joined as co-plaintiff. She therefore waited until she obtained her separate title as sole proprietress of Lot No. 16, and on March 14, 1962 her solicitors wrote to the appellant as follows:

"On our client's land is erected a portion of your temporary house marked in red in the photostat copy of the attached certified plan under section 3 of the Land and Mining Plans (Photographic copies) Ordinance, 1950.

On the purchase of the above land by our client on 2nd November, 1958 she requested you to remove the portion of your house to which you agreed but to date you have not fulfilled your promise.

You are on our client's land without any payment of rental and as a mere tenant at sufferance. Our client needs the land for her own use.

The attached plan indicated clearly the extent of the portion of your house on our client's land.

Take notice that you are required to remove the portion of your house on or before 30th April, 1962, failing which suitable proceedings will be instituted against you to have you removed from our client's land."

On May 22, 1962 the respondent filed her second action against the appellant in the sessions court at Kajang, claiming repossession of the portion of Lot No. 16 occupied by him. The problem that now rears its head in a different form is that the boundary line separating the respondent's land from Ngo Jin's runs through the middle of the appellant's house.

On March 31, 1964 the president of the sessions court gave judgment in favour of the respondent (plaintiff in the action). The appellant filed notice of appeal on April 1, 1964, but eventually, the president, while preparing the grounds of his judgment, came to the conclusion that he himself had erred by not following *In re Bobington's Tenancy*,(1) where it was said by Peterson J. following *Doe* v. *Archer*,(2) that a notice given to the tenant to quit part of the demised premises was bad, as it was not a notice to give up the whole. In that case a landlord had sold in two lots property let on a single tenancy but the tenant had not recognised the division of the tenancy. A notice to quit given by the purchaser of one lot was held invalid *ab initio* and not curable by a subsequent notice to quit given by the purchaser of the other lot.

The learned president having reversed his own decision it is now contended by counsel for the appellant that the order of the sessions court ought to be set aside. It is also argued that the facts *In re Bobington's Tenancy* are indistinguishable from the material facts in the

instant case, and that the invalidity of the solicitor's notice terminating the appellant's tenancy must necessarily result in dismissal of the claim, since the decision was based on no other grounds.

There is much force in this argument. There clearly was the relationship of landlord and tenant between Ngo Jin and the appellant which was not *ipso facto* determined when Ngo Jin sold a half-interest to the respondent. Nevertheless, subsequent events occurred which materially changed the situation. As the appellant said in his evidence: "I agreed to pay $40 per year as rent (to the previous owner) and repaired the house. Subsequently Ngo Jin become the owner of the land. I paid $5 per month. I paid the $5 per month and then this was increased with the annual assessment of the house. I paid rent right up to the end of 1963." Thus the original rent of $40 per annum paid to Rajendra when the latter was landlord (see Ex.P.13), went up, after Ngo Jin became landlord, to $5 per month and later to $6.60. In view of the rent increase that undoubtedly took place after 1958 the question arises whether or not a new contractual tenancy had supervened when rent was raised by agreement to the higher rate.

This is a material point which appears to have been overlooked by counsel on both sides. After the sale by Ngo Jin of the half-interest to the respondent, rent was in fact raised by a mutual agreement between the appellant and Ngo Jin, to which the respondent was not a party. This fact is established by the rent receipts (Ex.D.14), one of which (Ex.D.14E) showed that on April 23, 1960 the appellant paid Ngo Jin the total sum of $185, being $145 for the period March 1957 to July 1959, and $40 for the period January to April 1960. Rent for the first period ending July 1959 was therefore at the rate of $5 per month, and a higher rent of $6.60 was agreed upon between the appellant and Ngo Jin after 1958, when she had no shadow of right or title to the portion of the house standing on the respondent's land.

I am consequently of the opinion that, even if I am bound to follow *In re Bobington's Tenancy* in holding that the appellant's tenancy at $5 per month continued after 1958 without interruption notwithstanding the transfer of Ngo Jin's half-interest, such tenancy no longer exists after it was replaced by the fresh tenancy at the higher rent. The appellant had pleaded the Control of Rent Ordinance, 1956, in his defence and he had produced evidence which *prima facie* established that the house he occupies was one completed before January 31, 1948 and "premises" within the meaning of the Ordinance. I do not think this is open to dispute. Such being the case, section 6(2) applies, providing that —

> "Nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law prior to increasing the rent."

Hence it follows (1) that the appellant, by agreement with Ngo Jin, had accepted the determination by Ngo Jin of his tenancy, at $5 per month which was granted by her before 1958, which tenancy was binding on the respondent when she acquired her half-interest in the land; (2) that the appellant accepted in its place a fresh monthly tenancy from Ngo Jin, comprising not only a portion of Lot No. 15 belonging to herself, but also over a portion of Lot No. 16, of which she had no disposing power whatsoever; (3) that in so far as such fresh tenancy purported to comprise any area outside the boundary of Ngo Jin's own land, it was invalid: *nemo dat quod non habet*, and (4) that the appellant was and has been clearly a trespasser on the respondent's land after July 1959, to whom no notice is required to be given.

Notwithstanding that the premises in question are "premises" within the Control of Rent Ordinance, and that there subsists a relationship of landlord and tenant under the Ordinance as between Ngo Jin and the appellant, there is no such relationship between the respondent and appellant, and the Ordinance has no application.

This appeal is accordingly dismissed with costs and the judgment of the sessions court affirmed.

I notice that the order made in the sessions court has not been drawn up. There will be an order for possession against the defendant (appellant) that he do vacate forthwith from Lot No. 16, town of Kajang, and damages for trespass which I assess at $3.25 per month from August 1, 1959 to April 30, 1962 and at $6.50 per month from May 1, 1962 to April 30, 1965, amounting to $541.25. The order for costs in the sessions court is also affirmed.

Appeal dismissed.

MALAYAN BANKING LTD. v. TING EE NGIENG & ANOR.

[O.C.J. (McGilligan J.) May 12, 1965]

[Sibu — Civil Suit No. 55 of 1964]

Practice and Procedure — Amendment of statement of claim — R.S.C. 1957, O. 28 r. 1.

The plaintiffs applied for amendment of their statement of claim. In the original statement of claim the plaintiffs had alleged that the second defendant had stood as guarantor for the first defendant; they sought to substitute this by stating that the second defendant had stood as guarantor by a letter of guarantee in writing.

Held: the application for amendment should be allowed as —